

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GERLANDO CURRERI,)	
)	
Plaintiff,)	CIV 09-00630 PHX JAT MEA
)	
v.)	REPORT AND RECOMMENDATION
)	
PAUL BABEU, et al.,)	
)	
Defendants.)	
)	

TO THE HONORABLE JAMES A. TEILBORG:

Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983, on or about March 29, 2009. The complaint was dismissed with leave to amend. Plaintiff was granted two extensions of the time allowed to file an amended complaint. See Doc. 8. Plaintiff's first amended complaint was docketed August 3, 2009. See Doc. 9. The first amended complaint named ten defendants and alleged seventeen violations of Plaintiff's civil rights.

In an order filed January 7, 2010, the Court ordered Defendant Johnson to answer counts 4 and 5 of the amended complaint, ordered Defendant Jackson to answer counts 6 and 7 of the amended complaint, and ordered Defendant Venezuela to answer count 14 of the amended complaint. See Doc. 11. The Court dismissed the other counts of the complaint and the other named defendants from this matter.

1 Defendant Jackson waived service on or about February
2 1, 2010. See Doc. 13. Defendant Venezuela waived service on or
3 about February 1, 2010. See Doc. 18.

4 On April 6, 2010, Defendants Jackson and Venezuela
5 filed a motion to dismiss. See Doc. 19. Defendant Johnson
6 waived service on or about May 6, 2010, and joined in the motion
7 to dismiss filed by the other defendants. See Doc. 26.

8 In an order issued July 1, 2010, the Court denied the
9 Defendants' motion to dismiss. See Doc. 30. Accordingly, on
10 July 6, 2010, a scheduling order was issued requiring discovery
11 be completed by January 5, 2011, and that dispositive motions be
12 filed by March 4, 2011. The parties have engaged in discovery
13 and Plaintiff has filed numerous pleadings.

14 On October 22, 2010, Plaintiff filed a motion to amend
15 his complaint. See Doc. 49. Plaintiff seeks to "amend
16 erroneous claims of 8th amendment violations" and to "add some
17 critical facts." Id. Plaintiff also seeks to amend his
18 complaint to allege further violations of his constitutional
19 rights by Defendants. The lodged proposed second amended
20 complaint is an edited version of the first amended complaint,
21 and includes defendants previously dismissed from this suit.
22 Defendants have filed a response in opposition to the motion to
23 amend. See Doc. 50.

24 The Court is required to screen complaints brought by
25 prisoners seeking relief against a governmental entity or an
26 officer or an employee of a governmental entity. See 28 U.S.C.
27 § 1915A(a) (2006 & Supp. 2010). The Court must dismiss a
28 complaint or portion thereof if a plaintiff has raised claims

1 that are legally frivolous or malicious, that fail to state a
2 claim upon which relief may be granted, or that seek monetary
3 relief from a defendant who is immune from such relief. See id.
4 § 1915A(b)(1) & (2). Rule 15(a), Federal Rules of Civil
5 Procedure, provides that a plaintiff should be given leave to
6 amend his complaint when justice so requires. See, e.g., United
7 States v. Hougham, 364 U.S. 310, 316, 81 S. Ct. 13, 17 (1960);
8 Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973).
9 However, granting a plaintiff leave to amend "is subject to the
10 qualification that the amendment not cause undue prejudice to
11 the defendant, is not sought in bad faith, and is not futile."
12 Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 799 (9th
13 Cir. 2001) (citation omitted).

14 In exercising its discretion with regard to a motion to
15 amend a complaint filed after a responsive pleading has been
16 served, the Court should consider the prejudice to the opposing
17 party and the futility of allowing the amendment. See
18 Schlachter-Jones v. General Tele., 936 F.2d 435, 443-44 (9th
19 Cir. 1991). "[T]he policy of allowing the amendments of
20 pleadings must be tempered with considerations of undue delay,
21 bad faith or dilatory motive on the part of the movant, repeated
22 failure to cure deficiencies by amendments previously allowed,
23 undue prejudice to the opposing party by virtue of allowance of
24 the amendment, futility of amendment, etc." Id. at 443
25 (internal quotations omitted).

26 This matter has now proceeded through a motion to
27 dismiss the complaint and discovery. Discovery is set to close
28 in approximately one month. Plaintiff should not now be allowed

1 to amend his complaint to restore claims and defendants
2 previously dismissed from this matter. Allowing Plaintiff to
3 add additional causes of action to this suit at this time in
4 these proceedings, which would require further discovery,
5 prejudice newly added defendants, and delay the proceedings, is
6 not in the interests of justice in this matter. See Divkovic v.
7 Southern California Edison Co., 302 F.3d 1080, 1087 (9th Cir.
8 2002). The Court's discretion should not be exercised to allow
9 Plaintiff to add new factual allegations to his complaint which
10 would, in effect, alter his claims for relief. Cf. Jackson v.
11 Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990) (upholding
12 the denial of leave to amend because the plaintiff had delayed
13 filing the amended complaint for eight months beyond the time
14 they should have known of the existence of the claims and noting
15 that "[p]rejudice to the opposing party is the most important
16 factor" in determining whether to grant leave to amend); Duggins
17 v. Steak 'N Shake, Inc., 195 F.3d 828, 834 (6th Cir. 1999)
18 (upholding denial of leave to amend where the District Court
19 cited the plaintiff's undue delay in missing the deadline to
20 amend the complaint and undue prejudice to the defendant where
21 the plaintiff sought amendment after the close of discovery);
22 Smith v. Angelone, 111 F.3d 1126, 1134 (4th Cir. 1997) (stating
23 that "a motion to amend may be denied when it has been unduly
24 delayed and when allowing the motion would prejudice the
25 nonmovant").

26 **THEREFORE, IT IS RECOMMENDED THAT** Plaintiff's motion to
27 amend his complaint (Doc. 49) be **denied**.

1 This recommendation is not an order that is immediately
2 appealable to the Ninth Circuit Court of Appeals. Any notice of
3 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
4 Procedure, should not be filed until entry of the district
5 court's judgment.

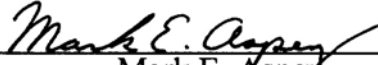
6 Pursuant to Rule 72(b), Federal Rules of Civil
7 Procedure, the parties shall have fourteen (14) days from the
8 date of service of a copy of this recommendation within which to
9 file specific written objections with the Court. Thereafter,
10 the parties have fourteen (14) days within which to file a
11 response to the objections. Pursuant to Rule 7.2, Local Rules
12 of Civil Procedure for the United States District Court for the
13 District of Arizona, objections to the Report and Recommendation
14 may not exceed seventeen (17) pages in length.

15 Failure to timely file objections to any factual or
16 legal determinations of the Magistrate Judge will be considered
17 a waiver of a party's right to de novo appellate consideration
18 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
19 1121 (9th Cir. 2003) (en banc). Failure to timely file
20 objections to any factual or legal determinations of the
21 Magistrate Judge will constitute a waiver of a party's right to
22 appellate review of the findings of fact and conclusions of law
23 in an order or judgment entered pursuant to the recommendation
24 of the Magistrate Judge.

25 Pursuant to 28 U.S.C. foll. § 2254, R. 11, the District
26 Court must "issue or deny a certificate of appealability when it
27 enters a final order adverse to the applicant." The undersigned
28 recommends that, should the Report and Recommendation be adopted

1 and, should Petitioner seek a certificate of appealability, a
2 certificate of appealability should be denied because Petitioner
3 has not made a substantial showing of the denial of a
4 constitutional right as required by 28 U.S.C.A § 2253(c)(2).

5 DATED this 10th day of December, 2010.

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8 Mark E. Asper
9 United States Magistrate Judge
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